

Labor Ready, Inc. and Tri-State Building and Construction Trades Council, National Building and Construction Trades Department, AFL-CIO.
Cases 9-CA-36223 and 9-CA-36395

September 27, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On July 12, 1999, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief.¹ The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

In affirming the judge's findings that Donald Huff, Thomas Williams, Steve Montoney, and James Blevins were bona fide job applicants, we note that the Respondent, in disputing these findings, relies in part on certain union logs maintained by Williams. The judge sets forth various passages from the logs in question, among them Williams' observation that the organizing campaign was unlikely to succeed but might have the effect of persuading Respondent that it was not worth the effort to continue performing construction work in that geographic area. Like the judge, we find the isolated passages cited by the Respondent reflect nothing more than Williams' opinion concerning how the Respondent might react to a vigorous organizing campaign. When considered in context, these passages do not justify the Respondent's argument that the four applicants were not interested in performing the work they applied for or were applying

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately presented the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

with an intent to engage in unlawful or unprotected activities calculated to injure the Respondent's business.³

In agreeing with the judge's conclusion that the four men were not subject to that portion of the Respondent's no-solicitation policy applicable to nonemployees, we emphasize our agreement with his finding that the four are statutory employees and that they were rightfully on the Respondent's premises pursuant to Respondent's own policy that persons who had submitted applications, passed the safety test, and signed the referral list must be physically present in the referral office in order to be eligible for referrals. We further emphasize the judge's finding that the area in which the four were soliciting is not a working area for the employee applicants but serves primarily as a waiting room and gathering place for them as they wait for referrals to the various jobsites where their actual work is to be performed. Finally, we note that here, as in a prior case against the Respondent, *Labor Ready, Inc.*, 327 NLRB 1055 (1999), there is no evidence that the solicitation activity in what was a non-work area for the employee applicants created a disturbance or otherwise interfered with the work going in the areas adjacent to the waiting area. On these particular facts, we agree that the Respondent's enforcement of its no-solicitation rules against the four employee applicants violated Section 8(a)(1) of the Act.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Labor Ready, Inc., Huntington and South Charleston, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Eric Gill, Esq., for the General Counsel.

Kevin L. Carr and Charles L. Woody, Esq. (Spilman, Thomas & Battle), for the Respondent.

Lafe C. Chafin, Esq., for the Charging Party.

DECISION

GEORGE ALEMÁN, Administrative Law Judge. This case was heard on January 14 and 15, 1999, in Huntington, West Virginia, following charges filed by Tri-State Building and Construction Trades Council, National Building and Construction Trades Department, AFL-CIO (the Union) on August 31

³ Member Hurtgen notes that, in his view, although there is some material in the logs that might tend to support the Respondent's position, the logs taken as a whole do not.

⁴ Member Hurtgen emphasizes his agreement with the judge's finding that, having completed the process mandated by the Respondent, including filling out required forms and placing their names on the Respondent's referral list, the four men ceased being mere applicants and became employees with an expectation of receiving a work assignment as soon as their names were reached on the list.

and November 16, 1998,¹ and the issuance, pursuant to those charges, of a complaint on December 24, by the Regional Director for Region 9 of the National Labor Relations Board (the Board). The complaint alleges that Labor Ready, Inc. (the Respondent) has, in various manner, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On January 5, 1999, the Respondent filed an answer to the complaint denying said allegations.

All parties to this proceeding were afforded full opportunity to appear at the hearing and to present oral as well as written evidence. On the basis of the entire record before me and my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporate entity, is in the business of supplying temporary workers nationwide to companies engaged in the construction, landscaping, warehousing, and light industrial markets from various facilities located throughout the United States, including the two facilities at issue here located in South Charleston and Huntington, West Virginia. It further performs non-construction related services. During the 12-month period preceding issuance of the complaint, the Respondent derived gross revenues in excess of \$50,000 for services performed outside the State of West Virginia. The complaint alleges, the Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Allegations

The complaint alleges that on various occasions the Respondent violated Section 8(a)(1) of the Act by prohibiting alleged discriminatees Donnie Huff, Thomas Williams, and Steve Montoney from soliciting union authorization cards from employees and job applicants awaiting job referrals at its South Charleston and Huntington facilities, and by summoning the police when they refused to do so. It further alleges that the Respondent violated Section 8(a)(3) and (1) by refusing to refer Huff, Williams, and Montoney for employment because of their Union or other protected concerted activity.

B. Related Prior Proceeding

The facts in this case are related to and arise out of events involving prior solicitation activity by Huff at Respondent's West Virginia offices which led to the filing of a charge (Case 9-CA-34950) and the issuance of a complaint against Respondent for refusing to allow Huff to engage in such conduct and for barring him from employment with Labor Ready. A hearing on those allegations, and on the question of whether a no-solicitation policy maintained and enforced by Respondent against Huff was valid and enforceable, was held on January

14, before Judge Schlesinger.² On May 14, Judge Schlesinger issued his decision finding that the Respondent's no-solicitation policy was unlawful and unenforceable, and that the Respondent had violated Section 8(a)(1) by refusing to allow Huff to solicit signatures on a petition from employees and applicants who were in its office waiting for job referrals, and Section 8(a)(3) and (1) by permanently barring him from employment. In so finding, Judge Schlesinger rejected arguments raised therein by the Respondent that Huff was not an employee but rather only a job applicant or "nonemployee" who, under its no-solicitation policy and pursuant to the Supreme Court's holdings in *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), was lawfully prohibited from soliciting on its premises.³ Judge Schlesinger found instead that as an applicant for employment, Huff was a statutory employee under *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), entitled to the Act's full protections, and that his right to solicit other employees on Respondent's property was not governed by the standard applicable to nonemployees set forth in *Babcock & Wilcox* and *Lechmere*, but rather by that

² The no-solicitation policy in Case 9-CA-34950 is the same one used by the Respondent in the instant case to prohibit Huff, Williams, and Montoney from soliciting authorization cards from other employee applicants. It consists of two parts, one applicable to "nonemployees," the other to employees. The policy reads as follows:

Nonemployees (including job applicants) are not allowed at any time to come upon Company premises for the purpose of any form of solicitation or literature distribution. This policy prohibits third parties or strangers from soliciting or handing out materials for any reason, including but not limited to, political, union, charitable, or similar activities. For the purposes of this policy, applicants for employment, including but not limited to those waiting for a job assignment or referral, are considered nonemployees, strangers, or third parties.

Employees are prohibited from distributing any form of literature or other materials in work areas. Employees are also prohibited from soliciting or distributing literature of any kind or for any cause during their assigned working time or soliciting any employee during that employee's working time at our site or a customer's site.

It is unclear from the decision in *Labor Ready, Inc. (Labor Ready I)*, 327 NLRB 1055 (1999), if the Board found the entire no-solicitation policy, including the above provision pertaining just to employees, unlawful, or whether its finding that the policy was unlawful was limited to the "nonemployee" provision. Thus, Judge Schlesinger's reasoning, adopted by the Board without comment, that the policy was "invalid on its face" because it equated job applicants with "nonemployees," suggests that the Board's finding regarding the invalidity of Respondent's no-solicitation policy pertained to the "nonemployee" provision only.

³ Under *Babcock & Wilcox* and *Lechmere*, an employer may deny nonemployee organizers who seek to solicit or distribute literature to its employees access to its property if other reasonable alternative means exist for communicating with employees. However, employees already lawfully on an employer's property are free to engage in such conduct in the nonworking areas of the employer's property during nonworking time unless the employer can justify a rule prohibiting such conduct as necessary to maintain discipline and production. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983); see also *Southern Services v. NLRB*, 954 F.2d 700, 702 (11th Cir. 1992), *Gayfers Department Store*, 324 NLRB 1246, 1249 (1997).

¹ All dates are in 1998, unless otherwise indicated.

set forth in *Republic Aviation*, supra. He further found, on the basis of the Board's decision in *Town & Country Electric*, 309 NLRB 1250 (1992), enf. denied 34 F.3d 625 (8th Cir. 1994), revd. 516 U.S. 625 (1995), that Huff's status as union organizer did not serve to deprive him of his employee status, as also argued by the Respondent. On March 26, 1999, after the close of the hearing in the matter currently before me, the Board issued a decision adopting Judge Schlesinger's finding. (*Labor Ready I*) supra.⁴ With this background in mind, I turn next to a discussion of the facts in this instant proceeding and the issues before me.

C. Factual Background

1. The work sign-up and referral procedures

The Respondent, as noted, supplies temporary workers to employers in various industries. Individuals seeking work with Labor Ready at either its Huntington or South Charleston offices are required to fill out a job application, take a safety test and, if successful, is permitted to place his or her name on a registry or job referral list.⁵ Once placed on the referral list, employee applicants generally wait around in the forward section of the office until a job order is received. However, the Respondent requires that an employee applicant must be physically present in the office in order to receive a job assignment.⁶

⁴ As noted, Judge Schlesinger's decision issued before the hearing in this case began. At the start of the hearing, the Respondent objected to the General Counsel's request that I take judicial notice of that decision. While as a public document Judge Schlesinger's decision could properly be noticed, the parties nevertheless were advised that his findings therein would not be controlling here as his recommended decision did not constitute a final determination by the Board, and that my decision would instead be based on the particular facts of this case (Tr. 10). The Board's subsequent adoption of Judge Schlesinger's recommended decision in *Labor Ready I*, however, is another matter, for its decision, which, as noted, issued after the hearing in this matter closed, is indeed final and binding on me.

⁵ Both the Huntington and South Charleston offices are configured in essentially the same manner. Thus, both are rectangular in shape and contain a counter which effectively separates the room into two distinct sections. One side of the counter contains the work area for Respondent's customer service representatives (CSR) whose duties include handing out and receiving job applications from applicants, administering the safety tests, answering questions from applicants, receiving phone calls from customers seeking employees, making job assignments to employee applicants, distributing equipment, as well as other administrative duties. All office equipment used by the CSR's and the office managers, such as phones, computers, and printers to perform their work is situated here (Tr. 159). The other side of the counter contains tables and chairs and is where applicants fill out their applications and other necessary paperwork, take the safety test, and generally wait around until given a job assignment. The job referral list which applicants sign after successfully completing their application and passing the safety test is kept on the counter and is under the CSR's control.

⁶ Thus, when filling out the application, employee applicants acknowledge their obligation to be present to receive a referral through the following language found in the application: "I know that I am required to report my availability . . . in the manner indicated by the dispatcher at least one hour before the scheduled start time. . . ." The above language suggests that applicants are made aware of their obligation to be physically present by the dispatcher. CSR Susan (Gregg)

Generally, on receipt of a work order from a client employer, a CSR takes the information and assigns the work to the employee applicant whose name next appears on the referral list by issuing him a computerized ticket which he hands to the client employer on arriving, and returns to Respondent's office at the end of the day presumably containing the information needed, e.g., hours worked, which enables the applicant to get paid.

2. The August 25, incident at the Huntington office

The record reflects that around 7 a.m. on August 25, Huff, accompanied by Williams, a union business agent, went to Respondent's Huntington office to apply for work.⁷ Once there, Huff asked Taylor if he would have to fill out a new application or simply update his W-4 tax form. According to Huff, Huntington facility manager, Greg Thomas, was also in the office at the time, and that after speaking with Thomas, Taylor returned and told him he would only have to complete a new W-4 form.⁸ After completing the W-4, Huff signed the job referral list, writing his name right below Williams' name. While Thomas denied being present in the office that morning, Huff's testimony that he was told by Taylor that he would not have to fill out a new job application was confirmed by Williams (Tr. 94) and not contested by Taylor. Accordingly, I credit Huff's testimony that he was not required to fill out a new job application and that he simply filled out a new W-4 and then placed his name on the referral list.

Taylor, an employer witness whose duties included dispatching employee applicants to the various job sites, testified in this regard that employee applicants "know" they have to be there "one hour or so" before they can be dispatched, suggesting through her testimony that she informs applicants of this policy. Although the Respondent denies that Taylor is a 2(11) supervisor, it admits that she was at all relevant times herein its agent within the meaning of Sec. 2(13) of the Act. The facts in the case support a finding of her agency status.

⁷ Huff was then employed by Affiliated Construction Trades Foundation (ACT) as a fair contracting representative. ACT does not appear to be a labor organization. Rather, according to Huff, ACT is a fact-gathering organization which assists in organizing campaigns, monitors prevailing wage projects, and insures that contractors are in compliance with State and Federal regulations. Huff had previously filled out a job application on February 11, 1997 (Tr. 17).

⁸ Thomas testified that he was not in the office at all that morning, but was there at some point later in the day. He claims that he arrived at the office that afternoon and observed Huff and Williams standing outside the office and that he engaged them in some small talk, e.g., the weather. Huff and Williams both contradict Thomas' claim in this regard, testifying that Thomas was indeed in the office that morning when they showed up (Tr. 21, 97). Huff, in fact, testified that it was Thomas who told Taylor about Huff not needing to fill out a new application. Taylor was never asked to confirm or deny if Thomas was the one she spoke to about Huff's application, or whether Thomas was in the office in the first place. Thomas was not a very convincing witness, and I simply do not believe his denial about being in the office on the morning of August 25, particularly in light of Taylor's failure to corroborate him on this point, and because of the mutually corroborative claim by Huff and Williams that they saw Thomas in the office that morning. Accordingly, I credit Huff and find that Thomas indeed was the one who told Taylor that he, Huff, was not required to complete a new job application.

After signing the referral list, Huff and Williams sat at a table where other applicants were waiting to be sent out on jobs and began discussing the Union with them and distributing union authorization cards. Huff and Williams both testified that soon thereafter, Taylor approached them and asked them to stop their solicitation and distribution of cards. Huff recalls that Taylor spoke in a loud voice and stated that “we were not allowed to be talking to other employees or getting their names, anything of that nature” (Tr. 96). Taylor admits seeing Huff distributing cards, but denied seeing Williams doing so. She recalls telling Huff that he was not permitted to distribute the cards in the office because of Respondent’s no-solicitation policy, but that he was free to do so outside the premises. Huff responded that they were engaged in legally protected concerted activity and intended to continue doing so (Tr. 22, 96).

Huff and Williams did eventually leave the office. Williams testified that once outside Thomas approached and told them that he had consulted with company lawyers that morning and been advised that while Judge’s Schlesinger’s decision in *Labor Ready I* was on appeal, Williams and Huff would be viewed as being in violation of Respondent’s no-solicitation policy that such activity was to cease. He further advised that if they had any questions regarding the matter, they should contact Respondent’s attorneys. Williams claims Huff stated that they knew their rights, and had no interest in speaking with Respondent’s attorneys. Williams then added that Thomas should not confuse what was occurring at the Huntington office that day, e.g., solicitation of Union representation cards from employees, with the conduct engaged in by Huff in the *Labor Ready I* case, e.g., soliciting of employees signatures so as to have Respondent revert back to the manner by which employees were referred out to jobs (Tr. 97–98). After some more discussion and placing a call to their attorney, Huff and Williams left. I credit Williams and find that such a conversation did take place and that Thomas in fact told him and Huff they were not permitted to solicit inside the office while the judge’s *Labor Ready I* decision was being appealed. Thomas, as noted, admits having met Huff and Williams outside the Huntington office on August 25. However, his claim that they merely engaged in small chat about the weather is simply not credible, as was his purported inability to recall seeing Williams inside the office that day (Tr. 183).

The record reflects that around 8:30 a.m. that same day, job applicant James Blevins appeared at the Huntington office to apply for employment. He recalls seeing Huff and Williams, whom he had known for some time, still in the office. Blevins testified that on asking Taylor for an application, the latter pulled a note from behind the counter which read, “Union men don’t sign anything,” showed it to him, and then placed it back behind the counter.⁹ Taylor then asked him for two forms of

identification, and handed Blevins a job application which he filled out and returned. Blevins did not sign the referral list that day as Taylor told him it was too late to do so and he should return the next day and put his name on the list, which he agreed to do.

3. The August 26, incident at the Huntington office

Huff and Williams returned to the Huntington office around 7 a.m. the following day, August 26, and this time found Thomas standing at the entrance to the facility. According to Williams, Thomas told them they would not be permitted to distribute papers or solicit signatures on cards inside the premises. Williams responded that he had a right to engage in such activity inside the office and, after showing Thomas a blank authorization card, went inside and placed his name on the referral list. Huff also entered the office and observed Thomas sign the referral list. Huff claims that when he tried to sign the list, Thomas called him outside and told him that, based on the advice of legal counsel, there would be no work for him as he was still barred from the office, and that if Huff did not leave, the police would be called. Huff responded that he was engaged in legally protected activity and therefore had the right to engage in such solicitation and did not believe he should be barred from entering the office. Huff refused to leave and instead went back inside and, joined by Williams, resumed his soliciting activities. Within 20 minutes or so, Blevins entered the office and signed the referral list.

Thomas did in fact call the police. When the police arrived, Huff was asked to step outside, which he did. Thomas then informed the police officer that Huff was trespassing as he had been barred from entering Labor Ready’s offices. Huff and Williams responded by showing the police officer a copy of Judge Schlesinger’s decision. Thomas in the meantime went back to the office. Unsure of what to do at that point, the police officer contacted his superior, a Sgt. Brown, who subsequently appeared accompanied by one or two other police officers. A short while later, Sgt. Brown and the other police officers entered the office and spoke with Thomas, presumably about Judge Schlesinger’s decision, at which point Thomas referred them to his legal counsel. After discussing the matter on the phone with Respondent’s attorney, Sgt. Brown again spoke

the note after showing it to Blevins, Taylor testified she simply “threw it in the trash” (Tr. 209). Yet, asked if she showed the note to any other employee applicant, she testified, “I don’t remember; I don’t know,” stating further, “I don’t think I did,” suggesting the likelihood that she might have shown it to someone else (Tr. 208). Taylor’s assertion that no other applicant asked her “that question” is somewhat ambiguous, for it is unclear if she is referring to the question about who the two gentlemen were, or to Blevins’ purported query of whether he had to sign anything. Taylor, it should be noted, was also uncertain as to what Blevins might have been referring to when, according to Taylor, he asked if he had to sign anything. Thus, she admitted it is quite possible that Blevins might have been making reference to signing the job register. Given the vagueness and inconsistencies in her testimony, I reject her version of this incident and find, as testified to by Blevins, that Taylor had a prepared note stating, “Union men don’t sign anything” which she showed to Blevins when he came up to the counter to apply for work. I am, however, convinced from her own admissions that Taylor knew that both Huff and Williams were with the Union.

⁹ Taylor’s version is that Blevins came up to her, nodded to two men seated at a table, and asked who they were. Taylor purportedly took a slip of paper, wrote the word “Union” on it, and showed it to Blevins. She claims that Blevins then asked if he had to sign anything, and that she responded to his query by simply writing on the same piece of paper, “you don’t have to sign anything,” below the word “Union.” I credit Blevins over Taylor regarding this incident. Taylor’s version simply lacked the ring of truth. Asked, for example, what she did with

with Huff and Williams, and told them he was going to treat their activity in the same manner as informational picketing. He then asked if they would be agreeable to soliciting only on the public sidewalk, but Huff and Williams said it was not agreeable with them, that they felt they had a right to be inside the office, but that they would not contravene Sgt. Brown's directive. Sgt. Brown informed them that if they went back inside, a confrontation would more than likely occur, and that the police would again be called and that, if they come out again, they would "have to take some kind of action." (Tr. 103). When Williams and Huff asked if they were being told to leave, Sgt. Brown replied he was not, but suggested it would be best if they did not go back inside again.¹⁰

4. The October 28, incident at the Charleston office

Around 7 a.m. on October 28, Huff, accompanied by Steve Montoney, went to the Charleston office to apply for work.¹¹ When Huff asked the woman behind the counter if he was still barred from Labor Ready's offices, the woman looked up Huff's name and then responded that he was indeed still barred. Montoney then signed the referral list. He testified that there were approximately 15–20 people total already waiting inside and outside the office for job referrals. South Charleston office manager, Nick Boggs, an admitted supervisor, testified the number of employee applicants waiting inside the office numbered between 50–60. After Montoney signed the referral list, he and Huff went outside to talk to those employee applicants who were outside smoking. Montoney claims he then retrieved his briefcase from his car containing blank authorization cards, returned to the group of employees waiting outside, and identified himself as a voluntary organizer for the Laborers' Union. He told employees that he had authorization cards and that if any employee was interested, they should come inside the office with him and fill out a card. Montoney claims that as he entered the office, he again identified himself aloud as a voluntary union organizer, presumably for the benefit of those employees who were waiting inside, and handed out authorization cards.

Soon after re-entering the office, Boggs, according to Montoney, approached and informed Montoney that he would have to stop as there was a restraining order against the Union pro-

hibiting such conduct.¹² Montoney responded that he was a bona fide employee and had a right to be in the office soliciting as his conduct constituted protected concerted activity. Montoney continued to solicit at which point Boggs, according to Montoney, threatened to call the police to have him removed if he did not stop his activity. Montoney, however, reasserted his Section 7 right to be there. Some 5 minutes later, according to Montoney, two police officers arrived in the office and instructed him to leave because Boggs wanted him out. Montoney protested that he was a legal employee and was simply exercising his rights under the Act. The police officers then asked him to step outside, and after some discussion, Montoney was told he could continue his organizing activity on the sidewalk area outside the office, so long as he did not block the entrance to the office, and warned by the police that if they had to return Montoney would be arrested for trespassing or disorderly conduct. Montoney assured him he did not want to go to jail. After the police left, several of the employees who were inside came out and signed cards. Montoney denies that any disruption occurred as a result of his solicitation activities.¹³

Boggs' version of this incident does not differ much from Montoney's version. Thus, he recalls seeing Montoney open up his briefcase and observing people milling around him. Claiming he did not know what Montoney was up to, Boggs testified that whatever Montoney was doing it had created a disruption in the office, and that it was at that point that he went over to see what Montoney was doing and to instruct him to stop whatever he was doing. Montoney responded that he was distributing information to employees, at which point Boggs purportedly told him to do so outside because Respondent's no-solicitation policy prohibited the solicitation or distribution of literature "in the workplace." Boggs described the workplace as the entire office. Boggs claims he told Montoney several times to take his activities outside the building and that if he did so, he (Boggs) would have no problem with what he was doing. According to Boggs, Montoney's "in office" solicitation activity was disrupting his entire operation, and making it difficult for him to do his own work. Although he claims that Montoney would have been allowed to remain in the office had he stopped his solicitation, Boggs admits he never actually said this to Montoney (Tr. 173; 164–165). Boggs was not asked about the arrival of, or conversations he may have had with, the police on October 28, regarding Montoney's activity. The record reflects that Montoney was not given a job referral that day, even

¹⁰ Williams' uncontradicted testimony that he and Huff were advised by the police sergeant not to go back into the office suggests that they would not have been permitted back into the office even if they agreed not to solicit. It is not clear, however, if the police sergeant was simply relaying a message received from Thomas or conveying his own personal view as to what Huff and Williams should or should not do.

¹¹ Montoney was also a fair contracting representative with ACT, as well as a member of Local 15 of the Bricklayers Union. On October 27, Montoney had gone to the Charleston office to apply for work at which time he filled out a job application and passed a safety quiz. He testified that that same day, he was offered a "clean up" job by the same woman, and when he told the woman he needed to make some phone calls first and would be right back, the woman told him he was needed right away, and assigned the job to someone else. Montoney then left for the day after being told he could come back the next day and sign the referral list.

¹² Boggs' testimony is that he saw people inside the office gathering around Montoney when the latter returned with his briefcase but that at the time he did not know what Montoney was up to and simply asked him to stop what he was doing because it was causing a disruption in the office. I credit Montoney and find that he made his union affiliation known when he reentered the office and that as he began distributing authorization cards and other union literature, Boggs told him he had to stop because the Respondent had a restraining order against such activities.

¹³ He did recall that at some point, a worker remarked that his father had been a union guy for some 33 years and that the only thing the union had done for his father was to "f—k over him." The worker then told Montoney to "take [his] shit and get out of there." (Tr. 133.)

though other employee applicants who signed the register after he did received referrals (Tr. 169).

D. Discussion and Findings

1. The 8(a)(1) allegations

The complaint, as noted, alleges, and the General Counsel contends, that the refusals to allow Huff, Williams, and Montoney to solicit Union cards from job applicants and employees at its Huntington and South Charleston offices were unlawful and violative of Section 8(a)(1). The Respondent denies the allegation contending, first, that Huff, Williams, and Montoney were not bona fide job applicants and thus entitled to none of the Act's protections, and second, even if they are bona fide applicants, they are deemed to be "nonemployees" within the meaning of its no-solicitation policy and, as such, were lawfully prohibited under the policy from soliciting other employees. As to its no-solicitation policy, the Respondent argues that the General Counsel in this case has not shown the rule to be overly broad or otherwise invalid. The Respondent's arguments are without merit.

The Respondent, as noted, claims that Huff, Williams, and Montoney were not bona fide job applicants because, in its view, they had no real intentions of working for Labor Ready but were instead using Labor Ready as a conduit for organizing its construction customers. While all three admitted that if hired they would engage in efforts to organize Respondent's, as well as its customers', employees, they further testified that their intent in applying for work was first and foremost to obtain employment with Respondent. Thus, Huff testified that his intent in applying for work on August 25, was to "get a job and work for Labor Ready" as well as to "organize Labor Ready" and its customers (Tr. 41-42). Williams testified that he would have accepted "any job that they offered me" (Tr. 111), and Montoney similarly explained that he would have accepted "any type of work" and that he "applied for whatever positions was [sic] available" (Tr. 130).

The Respondent offered no evidence to contradict their claims. Instead, as to Huff, it theorizes that Huff could not have seriously believed when he applied for work on August 25, that he would receive employment with Labor Ready as he knew full well that he had been permanently banned from any further employment with Respondent. Huff, however, explained that he still believed he might be able to secure employment with Respondent despite the employment ban imposed on him by Respondent. I am inclined to believe Huff. In this regard, I note that when Huff visited the Huntington office on August 25, Judge Schlesinger had already issued his decision finding the work ban to be unlawful. It therefore would not have been unreasonable for Huff to have believed, given Judge Schlesinger's ruling that the ban was unlawful, that the Respondent would abide by that ruling and allow him to sign up for job referrals, as he in fact was permitted to do on August 25. Accordingly, I find no support for the Respondent's claim that Huff was not a bona fide job applicant.

As to Williams, the Respondent points to certain remarks recorded in a daily log (R. Exhs. 5, 6) kept by Williams in connection with the Union's efforts to organize Labor Ready as evidence that Williams had no intentions of working for Labor

Ready, and was instead seeking to undermine and disrupt Respondent's operations.¹⁴ Contrary to the Respondent, I find nothing in the portions of Williams' daily log cited by the Respondent or, for that matter, elsewhere in log, to support Respondent's position that Williams' motivation for seeking employment with Labor Ready was to somehow cause harm to or undermine its operations, or to suggest that Williams had no real interest in working for Respondent. Rather, the remarks are more suggestive of typical organizational campaign rhetoric and strategy, and reflect nothing more than Williams' opinion on how the Respondent might react to the Union's campaign. They do not, however, indicate either expressly or by implication that Williams was not truly interested in working for Respondent or that his intention in obtaining employment was to disrupt Labor Ready's operations or to somehow force it to give up its construction customers. As with Huff, I find the Respondent has not demonstrated that Williams was not a bona fide job applicant. The fact that Williams also intended to engage in organizational efforts once employed by Respondent does not negate a finding that he was a bona fide employee applicant. *Town & Country Electric*, 309 NLRB 1250, (1992), enf. denied 34 F.3d 625 (1994), revd. 516 U.S. 85 (1995).

In support of its claim that Montoney was not a bona fide job applicant, the Respondent points to the latter's refusal to accept the job offered to him on October 27, when he first appeared at the South Charleston office, suggesting thereby that this constitutes proof that Montoney was not interested in working for Respondent. The Respondent, however, misreads Montoney's testimony. First, Montoney makes clear in his testimony that he only visited the South Charleston office on October 27, to inquire about applying for work and to fill out the necessary paperwork, and had no plans to begin work that particular day (Tr. 130, 143). The fact that he showed up at the South Charleston office at 11 a.m. that day supports Montoney's claim in this regard.¹⁵ Thus, to the extent Montoney can be said to have refused a job offer that day, the refusal was prompted not by a purported lack of interest on Montoney's part, as claimed by the Respondent, but rather because Montoney had not intended to begin work that day.¹⁶ The following day, however, Montoney showed up at the South Charleston office at 7 a.m. ready

¹⁴ The remarks make reference to attempts by the Union to "turn up the heat a little" against Respondent by finding legitimate unfair labor practice charges to file against it; to Williams' observation that while he did not believe the Union would be successful in organizing Respondent, the latter would nevertheless have a hard time taking care of business during the Union's organizational campaign; and to his belief that the Respondent might very well decide it would not be "worth their effort to try and continue doing construction work in the Huntington area." (RB:15-16.)

¹⁵ Respondent opened its offices at 5:30 a.m.

¹⁶ Although he had no intentions of working that day, Montoney credibly explained that when told about the job that was available, he informed the woman behind the counter that he would be willing to accept the position but first had to make some calls and would be ready in 20 minutes. The woman, however, informed him that she needed someone right away and presumably assigned to work to some other employee applicant. Montoney's testimony that he had no lunch money or tools with him that day reasonably explains why he needed to make the calls before accepting the position.

and willing to accept work. The Respondent again suggests that because Montoney left the office early on October 28, and did not seek employment with any other employer that day, he could not have been serious about obtaining employment with Respondent. Montoney, however, credibly explained that he refused to reenter the South Charleston office to await a referral for a job because one of the police officers who responded to Respondent's call informed him he would be arrested if he "went back in the office" (Tr. 153). Thus, Montoney left early not because he was not interested in working for Respondent but rather because he had been threatened with arrest if he reentered the premises.¹⁷

In sum, the Respondent's contention that Huff, Williams, and Montoney were not bona fide job applicants lacks evidentiary support and is rejected, as is its further claim that Blevins too was not a bona fide applicant. Blevins, like the three alleged discriminatees herein, likewise testified that he applied for work with Respondent on August 26, because he wanted to make some extra money to supplement what he earned as a business manager with Laborers Local Union 1445. The Respondent, as with Huff, Williams, and Montoney, offered no evidence to refute Blevins' claim of wanting to work for Respondent to make some extra money, and instead relies on its belief that Blevins was not a credible witness. I found Blevins to be a generally credible witness and see no reason to reject his testimony in this regard. Accordingly, I find that Blevins, like Huff, Williams, and Montoney, was a bona fide job applicant.

The Respondent next argues that even if found to be bona fide job applicants, Huff, Williams, and Montoney were lawfully prevented from soliciting in its offices pursuant to its no-solicitation policy which expressly prohibits "nonemployees (including job applicants)" from entering its premises for the purpose of soliciting or distributing literature. As noted, in *Labor Ready I* the Respondent raised this very defense with respect to Huff's prior attempts to solicit in its offices. The Board, as further noted, rejected that argument on grounds that as a job applicant, Huff was deemed to be a statutory employee lawfully on Respondent's premises whose right to engage in solicitation of other employees was governed by the *Republic Aviation* standard applicable to employees, and not the "non-employee" *Babcock & Wilcox/Lechmere* standard.

That same reasoning is applicable here. Thus, there is no disputing that Huff, Williams, and Montoney all applied for work and that they were, as found above, bona fide job applicants. Nor can there be any doubt that they were lawfully entitled to be on Respondent's premises for Respondent's policy required that all successful employee applicants, e.g., those who submitted applications, passed the safety test, and signed the referral list, be physically present in the office in order to receive a job referral. Huff, Williams, and Montoney clearly satisfied that criteria. Thus, Huff, as noted, was not required to

resubmit an application when he visited the Huntington office on August 25, as the Respondent still had his previous application on file, and was simply instructed to fill out a new W-4 form and sign the referral list, which he did. Williams and Montoney did fill out applications, took the required safety test, and then signed the job referral list at the Huntington and South Charleston office, respectively. As bona fide job applicants, Huff, Williams, and Montoney were therefore statutory employees, and consequently not subject to the no-solicitation policy applicable to "nonemployees."¹⁸

The Respondent, however, further points out that it also maintains a no solicitation policy for employees which it contends is lawful under Board and court precedent as it forbids employee solicitation and distribution in work areas and during working time. It asserts that the entire office area at both its Huntington and South Charleston facilities, including the section where employees are required to wait until referred out to jobs, and where the solicitation in question here took place, constitutes an employee "work area." Consequently, it argues that even if Huff, Williams, and Montoney are found to be employees, they were lawfully prohibited from soliciting in a work area pursuant to its employee no-solicitation policy. The argument without merit.

Thus, I do not agree that the portion of the Respondent's offices where employee applicants are expected to wait for a job assignment is, as the Respondent, claims, an employee "work area." Although used by applicants to fill out their job applications and to take the safety test, the area serves primarily as a waiting room and gathering place for employee applicants. Thus, Taylor's testimony, that after completing their applica-

¹⁸ In fact, in *Labor Ready I*, the Board, as noted, found the Respondent's no-solicitation policy to be unlawful on its face as it equated job applicants, who as noted, are statutory employees, with nonemployees, and thereby discouraged them from engaging in protected and concerted activities. While Respondent's no-solicitation policy is not specifically alleged in this case to be unlawful, it is well settled that the Board's finding in one proceeding can serve as a basis for a finding in a later proceeding involving the same employer, *Advertisers Mfg.*, 275 NLRB 100 (1985), and that, under the principle of collateral estoppel, an issue that has been fully litigated in an earlier proceeding involving the same parties may not be relitigated in a subsequent proceeding. See *Montana v. U.S.*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 fn. 5 (1979); *Great Lakes Chemical Corp.*, 300 NLRB 1024, 1025 (1990); *Bethlehem Steel Corp.*, 283 NLRB 254, 255 (1987); *American Model & Pattern, Inc.*, 277 NLRB 176, 181 (1985); *Harvey's Resort Hotel*, 271 NLRB 306 (1984). By raising its no-solicitation policy for nonemployees as a defense to its refusal to allow Huff, Williams, and Montoney to solicit in its offices, the Respondent is in effect seeking to relitigate the validity of that policy. As that particular question was fully litigated by the parties to this proceeding and resolved by the Board in *Labor Ready I*, I find that the Respondent is collaterally estopped from raising it in this proceeding in defense of its actions.

I am nevertheless convinced that on completing the application process, passing the safety test (neither of which Huff was required to undergo), filling out the required tax withholding (W-4) forms, and signing the referral list, Huff, Williams, Montoney, and Blevins, for all intents and purposes, ceased being mere job applicants and became employees of Respondent with an expectation of receiving a work assignment as soon as their names were reached on the job referral list.

¹⁷ The record does not make clear when Montoney might have left the premises on October 28. That Montoney chose not to continue searching for work with other employers after being denied, on the threat of arrest, re-entry to the South Charleston office is readily understandable and hardly constitutes proof that Montoney had no interest in obtaining employment with Respondent.

tions employee applicants often just “linger” around in the area and for the most part “wait there at the tables” until given an assignment, supports such a finding (Tr. 211–212). Further, Boggs’ testimony that the “back part (other side of the counter) is where the employee CSR’s work, and I work,” and where the office equipment is situated, makes clear that the South Charleston, and Huntington’s office personnel have their own distinct work area separate and apart from the waiting area designated for employee applicants. In this regard I reject as pure exaggeration Bogg’s, as well as Thomas’, averment that the entire office space, e.g., the areas on both sides of the counter at the South Charleston and Huntington facilities, constitutes one large employee work area. Rather, I find that the waiting area is a nonwork area for employee applicants. In fact, it is undisputed, and Thomas so testified (Tr. 195), that an employee applicants’ actual work site is not the Respondent’s office but rather the jobsite of the client employer to which the applicant has been referred for employment.

In view of the foregoing, I find that the solicitation engaged in by Huff and Williams at the Huntington office on August 25 and 26, and by Huff and Montoney at the South Charleston office on October 28, did in fact occur in a nonwork area and during their nonworking time, and that it was, therefore, protected by Section 7 of the Act.¹⁹ Accordingly, I further find that the Respondent, as alleged in the complaint, violated Section 8(a)(1) of the Act when Taylor, on August 25, and Thomas, on August 26, prohibited Huff and Williams from soliciting in the Huntington office; when Thomas called the police on August 26, to have Huff and Williams removed from the Huntington office for refusing to stop their solicitation, *Roadway Package System*, 302 NLRB 961, 973–974 (1991), and when Boggs, on October 28, at the South Charleston facility, also interfered with Montoney’s right to solicit in the office and thereafter called the police when he refused to do so. *Id.* Finally, I agree with the General Counsel that the Respondent also violated Section 8(a)(1) when Taylor handed Blevins a note stating, “union men don’t sign anything.” This unsolicited remark by Taylor was, in my view, coercive in that it was clearly intended as a warning to Blevins not to sign any of the

authorization cards which Huff and Williams were distributing to other employees in the office at the time. Blevins could reasonably have viewed the remark as a threat that signing such a card might adversely affect his chances of receiving a job referral.

2. The 8(a)(3) allegations

The complaint alleges, the General Counsel contends, and the Respondent denies that it unlawfully refused to refer Huff, Williams, and Montoney to jobs because of their Union activity. The Respondent instead argues that Huff was not referred for employment because he had previously been banned from any further employment with Labor Ready, and that Montoney and Williams were never actually denied job referrals but were instead instructed not to solicit in its offices. Had Montoney and Williams adhered to Respondent’s no-solicitation policy and instructions, they would have been allowed to remain in the office and remained eligible for job referrals. Thus, it argues that it was Montoney’s and Williams’ own unwillingness to obey Respondent’s instructions, not their union activities, which led to their not receiving any job referrals.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel bears an initial burden of making a prima facie showing that the Respondent’s refusal to refer Huff, Williams, and Montoney was motivated, at least in part, by their involvement in union or other protected activity. The General Counsel meets that burden by showing that the alleged discriminatees were engaged in union or other protected activity, that the Respondent knew of such activity, and that it harbored antiunion animus. Should the General Counsel prevail in this regard, the burden shifts to the Respondent to demonstrate that these individuals would not have been referred to jobs even if they had not engaged in such activity. To satisfy its burden, an employer cannot simply present a legitimate reason for its actions but must instead persuade by a preponderance of credible evidence that the same action would have taken place even in the absence of the protected conduct. *T & J Trucking Co.*, 316 NLRB 771 (1995).

The General Counsel has made out a prima facie case with respect to all three. The evidence makes clear that the Respondent knew full well that Huff, Williams, and Montoney were union activists intent on organizing its operations, and that it was strongly opposed to such activities. For example, the Respondent knew, given Huff’s prior attempts to solicit at its offices, and the findings made by the Board in *Labor Ready I* in connection with that activity, that Huff was a union activist. Further, Taylor’s claim that she identified Huff and Williams to Blevins on August 25, as being with the Union makes clear that she, and thus the Respondent, knew that Williams too was a union activist, which Williams subsequently confirmed when he and Huff openly began soliciting signatures on authorization cards from employee applicants awaiting referrals. I reject as not credible Taylor’s claim that she only saw Huff, but not Williams, engaged in such solicitation. Rather, I credit Williams and find that he too openly solicited cards from employee applicants that day and that Taylor observed him doing so and instructed him to stop. I am also convinced that Thomas must

¹⁹ The Respondent’s assertion on brief (p. 34) that Montoney was disrupting its operations by soliciting in the office is rejected as without merit. Its argument in this regard is based on Boggs’ testimony that there was “quite a ruckus” going on in the office, with “people bumping into people” to see what Montoney was doing (Tr. 163). Other than admitting that one job applicant expressed disapproval of unions, Montoney denied Boggs’ claim that his solicitation caused a disruption at the South Charleston office that day (Tr. 151). I credit Montoney over Boggs and find that Montoney’s activities did not cause a disruption at the South Charleston facility. The Respondent makes no similar claim of disruption with respect to the activities undertaken at the Huntington office by Williams and Huff. Taylor did testify, somewhat vaguely, that everyone in the office was “talking to each other about what was going on,” that there were some very “outspoken people in there” and that “at times they were sitting there arguing amongst themselves over it” (Tr. 210). She did not, however, claim that such discussion had disrupted Respondent’s operations in any way. Further, her testimony makes clear that she asked Huff and Williams to leave because Respondent prohibited any solicitation in the office, and not because they were being disruptive.

have known of Huff's and Williams' activities for, having found that he was present in the office that morning, it is highly unlikely he would not have heard the exchange between Taylor, Huff, and Williams. In fact, Williams' credited testimony that Thomas asked him and Huff to step outside to discuss the matter makes clear that he knew that Huff and Williams were union activists and that they were engaged in organizational efforts. Finally, as to Montoney, his testimony, which I also credit, establishes that the Respondent, through Boggs, learned, if it did not already know, of Montoney's union affiliation and sympathies soon after the latter applied for work on October 28. Respondent's unlawful refusals to allow Huff, Williams, and Montoney to solicit other applicants on their nonwork time in a nonwork area provides the evidence of antiunion animus needed by the General Counsel to make out a prima facie case. I therefore find that the General Counsel has made out a prima facie case under *Wright Line*, and that the burden now rests with the Respondent to present evidence to refute the prima facie case. The Respondent, I find, has not done so here.

The Respondent's sole defense with respect to Huff, as noted, is that it did not refer him out because Huff had been permanently barred from further employment with Labor Ready. The flaw in Respondent's defense is that no explanation was offered in this case as to why it barred Huff from all employment in the first place. If Huff was barred for some legitimate, nondiscriminatory reason unrelated to his Union or other protected activity, I would be inclined to agree with Respondent that its refusal to provide him with a job referral on August 25, did not contravene the Act. If, on the other hand, Huff's employment ban was motivated by his Union activities, then the Respondent's refusal to allow him onto its property to apply for work, or to refer him out for employment, would clearly have been discriminatory and violative of the Act. It was incumbent on the Respondent, as part of its *Wright Line* burden of persuasion, to provide some legitimate nondiscriminatory explanation for having barred Huff from all employment as a means of demonstrating that its refusal to refer him out was lawfully motivated. The Respondent, as noted, has not done so. Instead, it asks that I accept as face value its claim that it had a right not to offer Huff employment and to keep him off its property because it had, for reasons it chose not to reveal, permanently barred him from all such employment. I decline to do so, for under *Wright Line*, the Respondent's burden, as stated, is one of establishing by a preponderance of credible evidence that it refused to refer Huff for employment for reasons unrelated to his union activities. Its bald assertion herein that it acted lawfully in denying Huff employment because the latter had been permanently banned from employment, without providing the underlying reason for the permanent ban, clearly falls short of that mark. The Respondent, I find, has failed to refute the General Counsel's prima facie case with respect to Huff.²⁰ Accordingly, I further find that, as alleged in the com-

plaint and contended by the General Counsel, the Respondent unlawfully denied Huff employment on August 25 and 26, and again on October 28, when he sought to apply for work at the South Charleston facility, because of his activities on behalf of the Union, and that said actions violated Section 8(a)(3) and (1) of the Act.

With respect to Williams and Montoney, the Respondent, as noted, claims neither was denied a job referral because of his Union affiliation and that they were simply asked to refrain from soliciting inside the office and asked to leave when they refused to do so. It contends that had they adhered to its no-solicitation policy, both Williams and Montoney could have remained in the office and been referred out to jobs. However, as found above, Williams and Montoney had a Section 7 right to solicit in Respondent's offices, for the area in which they undertook such activity was a nonwork area and their activity occurred during their nonworking time. As such, the Respondent could not, without running afoul of the Act, condition Williams' and Montoney's receipt of a job referral on their agreement to relinquish that statutory right. See, e.g., *Goodless Electric Co.*, 321 NLRB 64, 68 (1996); *White-Evans Service Co.*, 285 NLRB 81, 82 (1987); *Remodeling by Oltmans, Inc.*, 263 NLRB 1152, 1162 (1982); *J. J. Security, Inc.*, 252 NLRB 1290, 1294 (1980). Yet, this is precisely what it has done here.

While there is no indication in the record that Williams and Montoney were expressly told they would not receive a job referral unless they gave up their Section 7 right to solicit cards in the office, that message was implicitly conveyed to them when the Respondent insisted that they leave the premises if they wished to continue with their protected activities. Knowing full well that they could remain eligible for a job assignment only if they were physically present in Respondent's office, and that Respondent, as evident by its decision to call the police, had no intentions of allowing them to continue soliciting on its premises, Williams and Montoney would have clearly recognized that the Respondent, implicitly, was presenting them with a Hobson's choice of either leaving the premises if they wished to continue soliciting, thereby forfeiting eligibility for employment, or remaining in the office and, therefore, eligible for work on condition that they cease their protected activities inside the office. The Respondent's assertion on brief with respect to Montoney, that he "would have been permitted to remain in the office (*and continue to be eligible for referral that day*)" had he been willing to refrain from engaging in protected activity inside the office, fully supports the view that Montoney's and Williams' chance for employment with Respondent was indeed made contingent on their willingness to give up his Section 7 rights (R. Br. 34-35).²¹ Accordingly, by

In the absence of any other explanation from the Respondent as to why it barred Huff, I find, consistent with the Board's ruling in *Labor Ready I*, that Huff was permanently barred from employment because of his union activities.

²¹ Respondent's argument on brief with respect to Williams, that he simply "was not present to be referred out to work . . . has never been asked to leave" and that it "has never refused to refer him out to work" is without merit, as it is based on Thomas' discredited version of events. Rather, Williams' above testimony makes clear that Thomas

²⁰ While the reason(s) for Respondent's permanent employment ban on Huff was not made clear in this record, in *Labor Ready I*, of which I take judicial notice, the Board found that the Respondent had violated Sec. 8(a)(3) and (1) by unlawfully barring Huff from any further employment because it believed "that Huff was organizing" its employees.

conditioning Williams' and Montoney's continued eligibility for job referrals on their agreement not to engage in Union solicitation on its premises, which they clearly had a Section 7 right to do, the Respondent, I find, has sought to discourage said individuals and other employee applicants from engaging in Union activities, and thereby violated Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By refusing to allow job applicants Donald Huff, Thomas Williams, and Stephen Montoney to solicit union authorization cards from other employees and job applicants during their nonworking time and in the nonwork areas of its Huntington and Charleston offices, by calling the police to remove them from its offices for engaging in such conduct, and by telling job applicants not to sign union authorization cards, the Respondent has violated Section 8(a)(1) of the Act.

3. By refusing to refer Huff, Williams, and Montoney for employment because they engaged in activities on behalf of the Union, the Respondent has violated Section 8(a)(3) and (1) of the Act.

4. The Respondent's above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy its unlawful refusal to refer Huff, Williams, and Montoney for employment, the Respondent shall be required to offer them employment to the same or substantially equivalent positions to which they would have been referred but for the Respondent's discriminatory conduct, without prejudice to any seniority or other rights and privileges they would have received through any such referral. The Respondent shall be required to make Huff, Williams, and Montoney whole for any loss of earnings and other benefits they may have suffered due to Respondent's failure and refusal to assign them work through its referral system.²² Any amounts due and owing to

indeed told both they could not engage in solicitation inside the office because it was appealing the *Labor Ready I* decision.

Documents introduced into evidence by the General Counsel as GC Exh. 3, the job referral list signed by Huff and Williams, suggests that Huff and Williams in fact were denied a job opportunity by virtue of their refusal to give up their Sec. 7 rights and remain in the office. Thus, GC Exh. 3 shows that both Huff's and Williams' names were crossed out. The Respondent, who maintains custody of the referral list, had no explanation for why both their names were crossed off the list. It is reasonable to infer, however, that it was the Respondent's doing and that it did so possibly soon after Huff and Williams were escorted out by the police following their refusal to end their solicitation inside the office.

²² In this case, the backpay period for Huff and Williams begins on August 25, when they first placed their names on the referral list at the

Huff, Williams, and Montoney shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on the amounts to be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, the Respondent shall be required to remove from its files any reference to its unlawful refusal to refer Huff, Williams, and Montoney for employment, and to notify these individuals in writing that it has done so and that its unlawful failure to refer them for employment will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²³

ORDER

The Respondent, Labor Ready, Inc., Huntington and South Charleston, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing its unlawful no-solicitation policy against job applicants Donald Huff, Thomas Williams, and Steve Montoney, or any other job applicant, by refusing to allow them to solicit union authorization cards from employees or job applicants awaiting job referrals during nonworking time and in the nonwork areas at the Huntington and South Charleston offices, by calling the police to have them removed from its offices because they engaged in such protected conduct, and by telling job applicants not to sign union authorization cards.

(b) Refusing to allow Huff to apply for work at its Huntington and South Charleston offices, and refusing to refer Huff, Williams, and Montoney for employment because of their membership in or activities on behalf of the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, notify Huff that he is free to return to its Huntington and South Charleston, West Virginia offices and apply for work, and offer him, Williams, and Montoney employment in jobs for which they had applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled had they not been discriminated against.

(b) Make Huff, Williams, and Montoney whole for any losses they may have suffered as a result of the discrimination

Huntington office, and for Montoney on October 28, when he placed his name on the South Charleston office's referral list. Although Montoney did apply for work on October 27, he readily admits he was not ready to work that day and in fact did not sign the referral list. The backpay period continues to run for all three individuals until such time as the Respondent makes them a good faith referral for employment.

²³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

against them, with interest, as set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any and all reference to its unlawful refusal to refer Huff, Williams, and Montoney for employment and, within 3 days thereafter, notify them in writing that it has done so and that its discriminatory conduct will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its offices nationwide copies of the attached notice marked "Appendix."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of its facilities, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 25, 1998.

²⁴ Although the General Counsel here, as he did in *Labor Ready I*, has not specifically requested a nationwide posting of the Notice to Employees, he does urge on brief (p. 18) that an appropriate remedy be fashioned to remedy the effects of the Respondent's unlawful conduct. As it is clear from the complaint allegations and findings herein that the Respondent continues to enforce at its Huntington and South Charleston, West Virginia offices, and presumably throughout its offices nationwide, the no-solicitation policy found unlawful in *Labor Ready I*, I find it appropriate to recommend, consistent with a similar recommendation made by Judge Schlesinger and adopted by the Board in *Labor Ready I*, that the Notice to Employees be posted nationwide.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit Donald Huff, Thomas Williams, and Steve Montoney or any other job applicant or employee from engaging in Union solicitation on our premises pursuant to the no-solicitation policy which the National Labor Relations Board has found to be unlawful, and WE WILL NOT call the police to have them removed from our premises for engaging in such protected activity, and WE WILL NOT tell employee applicants not to sign union authorization cards.

WE WILL NOT discriminate against Huff, Williams, and Montoney, or any other job applicant, by refusing to refer them for employment because of their support for or activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Huff, Williams, and Montoney employment to the jobs for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or any other rights or privileges they would have enjoyed but for the discrimination practiced against them.

WE WILL make Huff, Williams, and Montoney whole for any losses they may have suffered because of our discrimination against them, with interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to our unlawful refusal to refer Huff, Williams, and Montoney for employment and, within 3 days thereafter, WE WILL notify them in writing that this has been done and that our discriminatory conduct will not be used against them in any way.

LABOR READY, INC.